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Recommended Citation

Bernhardt, Roger, "Failing Grade: Our Irrelevant Bar Exam" (2003). *Publications*. Paper 283.
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July 2003

**Failing Grade: Our Irrelevant
Bar Exam**

Roger Bernhardt

We should all take an interest in what the California bar exam covers, because one of the functions it serves is to inform bar applicants about what we expect future lawyers to know. The grueling effort in preparing for it and the severe scoring employed in judging examinees lose much of their justification if the exam itself gives candidates a false message of what is and is not important to the practice of law.

Sadly, the bar examiners' coverage of Property in recent exam questions has generated a badly distorted image of what real estate practice is all about. For example, this year's question involved a property owner, Olga, who took a deed made out to her niece Nan and handed it to her friend Bruce with the instruction, "Hold this deed and record it if Nan survives me." She later told Bruce to destroy the deed, but he didn't; then Olga died.

I do not recite these facts in order to force you to decide "Who owns Blackacre," but rather to ask whether that is the kind of issue that we want law students to believe reflects the way that real estate lawyers spend their time. When has anyone represented a property owner who wanted to make (or made) a conditional delivery of property by way of a verbal escrow statement to a third party? When is the last time any of us were asked how to do that or were retained to litigate that kind of transaction? With all of the real and difficult problems that do confront real estate lawyers daily—as witnessed by the cases described in this Reporter—couldn't the bar examiners come up with any situation more realistic or significant?

This is not a one-time complaint. Last year's Property question concerned a "general warranty deed that contained all the typical covenants." But one would have to go back over a hundred years to find that kind of document used in a California transaction. The bar examiners can hardly contend that knowledge of such instruments has some relevance to current practice.

(Worse still, the July 2000 bar question contained the following astounding statement: "There is no statute or decision by an appellate court either repudiating or affirming the common law doctrine of destructibility of contingent remainders." Imagine bar candidates feeling that they must include both sides of that assumption in their bar essays if they want to get admitted! But henceforth, all the bar review courses will be sure to cover it.)

Law school property courses, as well as bar review programs, are sensitive to the bar exam. That means class time that I might productively spend on important landlord-tenant or real estate transaction or land use issues is reduced in order to allow me time to cover the issues forced on us by the above questions. As our courses are necessarily driven by the bar exam, it is tragic that the exam itself is not similarly driven by the reality of law practice.